

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3
4 JAMES S. GORDON, JR., an
5 individual,

6 Plaintiff,

7 v.

8
9 ASCENTIVE, LLC, a Delaware
10 Limited Liability Company,

11 Defendant.

No. CV-05-5079-FVS

ORDER DENYING MOTION TO
DISMISS FOR LACK OF
JURISDICTION

12
13 **BEFORE THE COURT** is Defendant's Motion to Dismiss for Lack of
14 Jurisdiction, Ct. Rec. 10, and Defendant's Motion to Strike Portions
15 of the Declaration of James Gordon, Jr., Ct. Rec. 26. The Court
16 heard oral argument on December 9, 2005. Defendant was represented
17 by Floyd Ivey. Plaintiff was represented by Douglas McKinley.

18 **I. BACKGROUND**

19 Defendant, Ascentive, LLC, is a Delaware limited liability
20 company that makes personal computer software. The company has a web
21 site through which its customers can purchase its products.
22 Customers can also call the telephone number on the web site and
23 place an order. Defendant's principle place of business is
24 Philadelphia, Pennsylvania, and it does not have an office in
25 Washington.

26 Plaintiff, James Gordon, is a Washington resident and the

1 registered user of the internet domain name "Gordonworks.com."
2 Plaintiff alleges Defendant violated Washington's Commercial
3 Electronic Mail Act, RCW § 19.190 et seq., and Washington's Consumer
4 Protection Act, RCW § 19.86 et seq., by initiating and/or conspiring
5 with others to initiate unsolicited commercial emails to Plaintiff.
6 Complaint, at ¶ 2.3.

7 **II. DISCUSSION**

8 Defendant moves to dismiss Plaintiff's Complaint under Federal
9 Rule of Civil Procedure 12(b) (2) for lack of personal jurisdiction.
10 Defendant also moves to strike a portion of Plaintiff's declaration
11 submitted in opposition to Defendant's motion to dismiss.

12 **A. Motion to Strike**

13 Defendant moves to strike the following statement from
14 Plaintiff's declaration submitted in opposition to Defendant's motion
15 to dismiss: "I subsequently received over 500 email messages sent by
16 the Defendant and/or others acting on behalf of the Defendant, each
17 of which advertised the Defendant's software products." Declaration
18 of James S. Gordon, Jr., at ¶ 5. Defendant moves to strike this
19 statement on the basis that it "comprises legal conclusions,
20 statements of opinions, is without foundation, does not demonstrate
21 personal knowledge or show competency to provide such testimony."
22 The Court determines Plaintiff is competent to testify that he
23 received email messages from the Defendant and such testimony would
24 be within Plaintiff's personal knowledge. But Plaintiff does not
25 have personal knowledge as to whether someone, acting on behalf of
26 the Defendant, sent Plaintiff emails. Thus, the Court strikes the

1 following portion from Plaintiff's statement: "and/or others acting
2 on behalf of Defendant."

3 **B. Procedure for Resolving Jurisdiction Dispute**

4 Plaintiff bears the burden of establishing that personal
5 jurisdiction exists. *Rio Props., Inc. v. Rio Int'l Interlink*, 284
6 F.3d 1007, 1019 (9th Cir. 2002) (citation omitted). Where, as here,
7 the Court is asked to resolve the motion on the parties' briefs and
8 affidavits, rather than hold an evidentiary hearing, Plaintiff need
9 only make a prima facie showing of personal jurisdiction. *Rano v.*
10 *Sipa Press, Inc.*, 987 F.2d 580 n. 3 (9th Cir. 1993). "That is, the
11 plaintiff need only demonstrate facts that if true would support
12 jurisdiction over the defendant." *Doe v. Unocal Corp.*, 248 F.3d 915,
13 922 (9th Cir. 2001) (quotations and citation omitted). In
14 determining whether Plaintiff has made a prima facie showing, the
15 Court is bound by the following principles: (1) uncontroverted
16 allegations in Plaintiff's Complaint are taken as true; (2) conflicts
17 between the facts contained in the parties' affidavits must be
18 resolved in Plaintiff's favor; and (3) all evidentiary materials are
19 construed in the light most favorable to Plaintiff. *Ochoa v. J.B.*
20 *Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002).

21 **C. Governing Law**

22 The Court's exercise of personal jurisdiction over a nonresident
23 must comport both with Washington's long-arm statute and with federal
24 constitutional requirements of due process. *Chan v. Soc'y*
25 *Expeditions*, 39 F.3d 1398, 1404-05 (9th Cir. 1994). Washington's
26 long-arm statute confers personal jurisdiction to the extent federal

1 due process allows. *Id.* at 1405. Thus, the jurisdictional inquiry
 2 collapses into a single analysis of due process. *Id.* Absent
 3 traditional bases for personal jurisdiction (physical presence,
 4 domicile or consent), due process requirements are satisfied when the
 5 defendant has "certain minimum contacts with the forum such that the
 6 maintenance of the suit does not offend traditional notions of fair
 7 play and substantial justice." *Helicopteros Nacionales de Columbia*
 8 *S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d
 9 (1984) (quotations omitted) (citing *Int'l Shoe Co. v. Washington*, 326
 10 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). Personal
 11 jurisdiction may be general or specific. *Sher v. Johnson*, 911 F.2d
 12 1357, 1361 (9th Cir. 1990) (citations omitted).

13 **D. General Versus Specific Jurisdiction**

14 General jurisdiction over a nonresident defendant exists when
 15 the defendant's activities in the state are "so substantial and
 16 continuous that justice allows the exercise of jurisdiction even for
 17 claims not arising from the defendant's contacts with the state."
 18 *Raymond v. Robinson*, 104 Wash. App. 627, 633, 15 P.3d 697, 699 (Div.
 19 2, 2001); *Helicopteros Nacionales*, 466 U.S. at 414-16, 104 S.Ct. at
 20 1872. RCW 4.28.080(10) authorizes general jurisdiction over a
 21 nonresident defendant if the defendant is transacting substantial and
 22 continuous business within Washington. See e.g., *Hein v. Taco Bell,*
 23 *Inc.*, 60 Wash. App. 325, 38-29, 803 P.2d 329 (1991) (noting that RCW
 24 4.28.080(10) creates general jurisdiction). On the other hand,
 25 specific jurisdiction requires a showing that the Defendant purposely
 26 established significant contacts with Washington, and that the cause

1 of action arises out of or is related to those contacts. *Burger King*
2 *Corp. v. Rudzewicz*, 471 U.S. 462, 471-73, 105 S.Ct. 2174, 2181-83, 85
3 L.Ed.2d 528 (1985). Specific jurisdiction is created by RCW
4 4.28.185. See e.g., *Raymond*, 104 Wash. App. at 636-37, 15 P.3d at
5 701-02 (2001).

6 In the present case, neither party addresses the distinctions
7 between general and specific jurisdiction. Therefore, since the
8 assertion of specific jurisdiction requires a lower threshold of
9 contacts than does general jurisdiction, the Court only addresses
10 whether it can exercise specific jurisdiction. Plaintiff argues
11 jurisdiction exists under Washington's long-arm statute, RCW
12 4.28.185(1)(a), because Defendant regularly transacts business within
13 the State of Washington. Complaint, at ¶¶ 2.1 and 2.2. RCW
14 4.28.185(1)(a) provides in part:

15 (1) Any person, whether or not a citizen or resident of
16 this state, who in person or through an agent does any of
17 the acts in this section enumerated, thereby submits said
18 person ... to the jurisdiction of the courts of this state
as to any cause of action arising from the doing of any of
the said acts:
19 (a) The transaction of any business within this state.

20 To establish that specific jurisdiction exists under the
transaction of business portion of Washington's long-arm statute, RCW
21 4.28.185(1)(a), Plaintiff must establish three factors: (1) Defendant
22 must have purposefully done some act or consummated some transaction
23 in Washington; (2) Plaintiff's cause of action must arise from, or be
24 connected with, such act or transaction; and (3) the exercise of
25 jurisdiction must be reasonable in that it must not offend
26 traditional notions of fair play and substantial justice. *Raymond*,

1 104 Wash.App. at 637, 15 P.3d at 702 (citing *Shute v. Carnival Cruise*
2 *Lines*, 113 Wash.2d 763, 767, 783 P.2d 78 (1999)). Plaintiff bears
3 the burden of satisfying the first two prongs of the test, and if he
4 succeeds, the burden shifts to Defendant to present a compelling case
5 that the exercise of jurisdiction would be unreasonable.

6 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.
7 2004).

8 **1. Purposeful Act**

9 To satisfy the first factor, Plaintiff must establish that
10 Defendant purposefully availed itself of the privilege of conducting
11 activities in Washington state, thereby invoking the benefits and
12 protections of its laws. *Raymond*, 104 Wash. App. at 636, 15 P.3d at
13 702; *Burger King*, 471 U.S. at 475, 105 S.Ct. at 2183. The focus of
14 this inquiry is on the quality and nature of Defendant's activities
15 in Washington, rather than the number of acts within the state or
16 some other mechanical standard. *Raymond*, 104 Wash. App. at 636, 15
17 P.3d at 702. (citation omitted). This protects against a non-
18 resident defendant being haled into local courts solely as the result
19 of "random, fortuitous or attenuated" contacts. *Burger King*, 471
20 U.S. at 475, 105 S.Ct. at 2183.

21 Here, Plaintiff alleges the Court should exercise specific
22 jurisdiction over Defendant because the Defendant allegedly sent
23 multiple commercial email messages to Plaintiff. Plaintiff further
24 alleges Defendant had actual knowledge that Plaintiff was a
25 Washington resident and that Defendant's emails violated Washington
26 law. To support this argument, Plaintiff points to the following

1 email he received from Mr. Schram, Manager of Ascentive. The email
2 reads, in pertinent part:

3 Thank you for forwarding your spam complaint. As a
4 software company based in Philadelphia, we have a number of
marketers that buy advertising to promote our software. We
are totally opposed to UCE (we rarely email our own
5 customers) and terminate partners that receive well-
grounded UCE complaints. For example, see
6 <http://www.ascedntive.com/run/click/karizma>

7 We have terminated over 20 partner accounts for spamming to
date. Could you please forward the entire original email,
8 if you still have it, in HTML format (if that's how you
received it?) So we can investigate the source of the
9 email. I have on my desk the message headers for the UCE's
you received. Please feel free to call me at the # below
10 if you have any questions.

11 Best regards,

12 Adam Schran, CEO
13 Ascentive - <http://www.ascentive.com>

14 Plaintiff received this email in response to a letter he wrote
15 informing Defendant that Plaintiff was a Washington resident who was
receiving commercial email messages sent by Defendant. Plaintiff
16 alleges that after this exchange between the parties, he
17 "subsequently received over 500 email messages sent by the Defendant
18 ... each of which advertised the Defendant's software products."

19 Declaration of James S. Gordon, Jr., at ¶ 5.

20 Although Defendant denies sending commercial emails to
21 Plaintiff, conflicts between the facts contained in the parties'
22 affidavits must be resolved in Plaintiff's favor. *Ochoa*, 287 F.3d at
23 1187. Plaintiff's declaration demonstrates the existence of facts
24 that, if proven, are sufficient to satisfy the purposeful availment
25 requirement for the exercise of personal jurisdiction. Assuming the
26 truth of the allegations in Plaintiff's Complaint, Defendant was

1 "doing business" in Washington when it sent unsolicited commercial
2 emails advertising its products to Plaintiff in an attempt to solicit
3 business for its website. Thus, Defendant committed a purposeful act
4 that occurred in Washington, just as if it had sent a letter to
5 Plaintiff advertising a particular product or service. Further,
6 Plaintiff has alleged Defendant sent these emails after being
7 notified that Plaintiff was a Washington resident and that the emails
8 were in violation of Washington law. Therefore, Defendant should
9 have reasonably expected to be haled into a court in Washington for
10 violation of its laws. Thus, the Court concludes Plaintiff has made
11 a prime facie showing that Defendant purposefully availed itself of
12 doing business within Washington state.

13 **2. Arising From**

14 Washington courts apply the "but for" test to determine whether
15 a claim against a nonresident business arises from, or is connected
16 with, its solicitation of business within Washington, thereby
17 satisfying the second prong of the specific jurisdiction test.
18 *Raymond*, 104 Wash. App. at 640, 15 P.3d at 703 (citations omitted).
19 This factor is established if the events giving rise to the claim
20 would not have occurred "but for" the defendant's actions within the
21 forum state. *Id.* The "but for" test preserves the requirement that
22 there be some nexus between the cause of action and the defendant's
23 activities in the forum state. *Id.*

24 Here, Plaintiff has satisfied the "but for" test since it is the
25 very act of sending commercial emails to Plaintiff at a Washington
26 email address that gives rise to Plaintiff's cause of action under

1 RCW 19.190 et seq. Thus, Plaintiff's cause of action arises from
2 Defendant's actions in Washington state.

3 **3. Personal Jurisdiction is Reasonable**

4 Finally, due process requires that the exercise of personal
5 jurisdiction over a nonresident defendant be reasonable. Defendant
6 bears the burden of demonstrating unreasonableness and must put on a
7 "compelling case." *Roth v. Garcia Marquez*, 942 F.2d 617, 625 (9th
8 Cir. 1991); *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2185.

9 However, Defendant has not met this burden and the Court is unaware
10 of any factors demonstrating a compelling case for why the Court's
11 exercise of personal jurisdiction over Defendant would be
12 unreasonable.

13 **III. CONCLUSION**

14 Plaintiff has established a *prima facie* case that specific
15 jurisdiction exists under the transaction of business portion of
16 Washington's long-arm statute, RCW 4.28.185(1) (a). Thus, Plaintiff's
17 allegations set forth in his declaration are sufficient to avoid a
18 motion to dismiss. *Data Disc, Inc. v. Sys. Tech. Assocs. Inc.*, 557
19 F.2d 1280, 1285 (9th Cir. 1977). Accordingly, Defendant's motion to
20 dismiss for lack of personal jurisdiction is denied. However, since
21 the affidavits submitted by Defendant raise disputed questions of
22 fact with regard to jurisdiction, the Court has the discretion to
23 hold an evidentiary hearing prior to a trial on the merits in order
24 to resolve the contested issues. *Stewart v. Ragland*, 934 F.2d 1033,
25 1036 n. 5 (9th Cir. 1991). In that situation, Plaintiff would bear
26 the burden of proving facts supporting the exercise of personal

jurisdiction by a preponderance of the evidence. *Data Disc*, 557 F.2d at 1285. Since the jurisdictional issues here are intertwined with the merits, the Court will determine the jurisdiction issue at trial, where Plaintiff "may present his case in a coherent, orderly fashion and without the risk of prejudicing his case on the merits." *Id.* at 1285 n. 2.

IT IS HEREBY ORDERED:

1. Defendant's Motion to Dismiss for Lack of Jurisdiction, **Ct.**

Rec. 10, is **DENIED**.

2. Defendant's Motion to Strike Portions of the Declaration of

James Gordon, Jr., **Ct. Rec. 26**, is **GRANTED IN PART AND DENIED IN**

PART.

IT IS SO ORDERED. The District Court Executive is hereby

directed to enter this Order and furnish copies to counsel.

DATED this 15th day of December, 2005.

s/ Fred Van Sickle

Fred Van Sickle
United States District Judge